RE: Rule 3-600 [ABA MR 1.13]
6/10/05 Commission Meeting
Open Session Item III.A.

May 8, 2004 Meeting Summary of Discussion re 3-600:

E. Consideration of Rule 3-600. Organization as Client

The Commission considered a February 23, 2004 draft of proposed amended rule 3-600 prepared by Mr. Lamport.

The following consensus votes were taken.

1. Perpetuate the status quo approach of the current rule: 2 yes, 5 no, 05 abstain.
2. Move to ABA approach but without outside reporting: 1 yes, 5 no, 1 abstain.
3. Explore a new two-tiered approach along the lines of the February 23, 2004 draft: 5 yes, 2 no, 1 abstain.
4. Replace the "actual or apparent agent" phrase with the comparable ABA language: 5 yes, 1 no, 2 abstain.
5. Use phrase "member representing an organization": 6 yes, 1 no, 0 abstain.

Discussion to continue at next meeting. Among the points raised in the course of the discussion were the following.

1. Under MR 1.13, a lawyer's discretion to take action is triggered by either: a violation of law + substantial injury; or a breach of fiduciary duty + substantial injury. Under RPC 3-600, the trigger is either: a violation of law; or substantial injury. For internal reporting up the ladder, consideration should be given to exploring a two-tier approach that broadens the triggers so that a lawyer may take action when faced with a situation where there is no substantial injury but must (unless it is not in the best interest of the client) take action when there is substantial injury.
2. A two-tier approach would be responsive to the concerns asserted by the ABA Task Force on Corporate Responsibility by extending and emphasizing a lawyer's obligation to act when faced with differing degrees of potentially harmful activities occurring within the corporate client and which the corporate control group may prevent or remedy if properly informed.
3. A two-tier approach may be unduly complex without adding much to the ABA internal reporting standard. Both MR 1.13 and the current version of RPC 3-600 can be construed as representing a two tier approach if you accept that a lawyer always has a duty to consider communicating and informing a client of significant developments even if not directed to do so under the limited terms of MR 1.13(b) and RPC 3-600(B). In California, RPC 3-600(A) is the umbrella provision that makes this clear.
4. In terms of rule language, the missing piece in both RPC 3-600 and MR 1.13 that can be added by a two-tier approach is the trigger of a violation of a duty to the corporation, as distinguished from a violation of law, that may not be a

substantial injury. To enhance lawyer accountability, this base should be covered expressly and not left to a lawyer's general duties.

5. There is an underlying concern with the basic goal of making a lawyer's internal reporting discretion "more prescriptive" and that is the problem of third party liability driving lawyers to make unnecessary internal reports and damaging the attorney client relationship. It may not be as damaging as an outside reporting reform but it remains a substantial concern. Current RPC 3-600 relies fully on a lawyer's sound discretion and this works best for maintaining the lawyer's ability to develop and cultivate the desired role of a trusted counselor.
6. External forces on the legal profession make it necessary for a change in this area of lawyer conduct.

Editor's Note: *The following are selected e-mail messages concerning rule 3-600. Messages only indirectly related to rule 3-600, such as the May 27, 2004 Melchior E-mail & June 23, 2004 Sapiro Reply thereto addressing a proposed new rule governing requests to waive the attorney-client privilege rule are not included.*

June 27, 2004 Sondheim E-mail to RRC List:

Commission members--

Continuing my efforts to speed up our drafting by, absent some overriding need for discussion, Stan's draft of 3-600 will be deemed **will be deemed tentatively approved by the Commission for posting on our website** except to the extent that, on or before July 7, there are specific objections from Commission members or others, set forth in an e-mail, to the rule, or a portion thereof.

Bottom line: **If you disagree with any part of the rule, either raise your objections by e-mail on or before July 7 or seal your lips at least until these tentative rules are posted on the Commission's website**. If you previously have voiced an objection to some portion of this rule, you **must do so again**.

With regard to Kurt's proposal of an addition to this rule and Jerry's response thereto (see pp. 257-258 of the agenda materials), we will consider that proposal after we consider rule 1-500 (agenda item F), if we appear to have enough time to do so.

Cheers,
Harry

June 30, 2004 Julien E-mail to Lamport, cc to RRC:

From: CommissionerJ2@aol.com [mailto:CommissionerJ2@aol.com]
Sent: Wednesday, June 30, 2004 12:42 PM
To: slamport@coxcastle.com
Cc: hbsondheim@earthlink.net; lfoy@hrice.com; mtuft@cwclaw.com; martinerz@ldbb.com; avoogd@technip.com; kabetzner@yahoo.com; pecklaw@prodigy.net; kmelchior@nossman.com; jsapiro@sapirolaw.com; pwvapnek@townsend.com;

justice.ruvolo@jud.ca.gov; Difuntorum, Randall; epgeorge@ix.netcom.com; slamport@ccnlaw.com
Subject: Re: [rrc] Rule 3-600: Agenda item E

Dear Stan,

...in (F) what is the member suppose to "... so inform such authority..."? Are they informing them of (1) the discharge; (2) the fact that the reasonably believe they have been discharged because of their actions or (3) of misbehavior of the organization.
It is not clear to me. It perhaps could be improved by stating: "shall so inform such authority of _____ unless the member reasonably..."

Best wishes,

J2

July 8, 2004 Tuft E-mail to RRC List:

I respectfully submit that the current draft of Rule 3-600(B) and (C) sends the wrong message to the public concerning the representation of organizational clients in today's legal environment and goes too far in distinguishing California from the rest of the Country.

Proposed Rule 3-600(B)

A lawyer that knows that a constituent of the entity client is acting, intents to act or refuses to act in a manner that is a violation of law or a violation of a legal obligation to the organization, in my opinion, is obligated to act in the best interests of the organization. Rule 3-600(B) as currently drafted only gives the lawyer the discretion to act in the best lawful interest of the organization. Depending on the circumstances, the discretion vested in the lawyer under this rule, if not exercised, would be inconsistent with the lawyer's duties of loyalty, communication and competence to the client.

A lawyer's duties to an organizational client should not be materially different from those that are owed to individual clients; yet, this rule suggests that they are. The language in the proposed discussion does not salvage the problem, but only make it more confusing for practitioners who do not specialize in legal ethics.

The recent revisions to Model Rule 1.13(b) were not only in response to concerns that lawyers felt constrained by confidentiality rules from reporting wrongdoing, but because lawyers who know of wrongdoing choose not to take action because it is in their own financial interest not to do so.

Both ABA rule 1.13(b) and the Restatement (section 96(2)) correctly provide that the lawyer's first obligation is to act in the best interest of the organization and that that obligation is mandatory

Our rule should provide that in the situations presented under paragraph (B) the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Rule 3-600(C)

The current draft attempts to compensate for the discretion vested in lawyers under paragraph (B) by providing a much broader trigger for requiring "up the ladder" reporting where the constituent acts, intends or refuses to act in a manner that is likely to result in substantial injury to the organization - even where the action is entirely lawful or does not amount to a violation of a legal obligation to the organization. (Would this include a bad marketing decision or acquisition?).

The trigger for mandatory up the ladder reporting should be narrowly defined so that the lawyer is not put in the position of substituting his or her business judgment for that of the company's management. The purpose of mandatory up the ladder reporting is to require lawyers to convince their clients to correct unlawful conduct that will likely cause substantial injury to the company (which as the ABA Corporate Responsibility Task Force reported, some lawyers have been reluctant to do because doing so was perceived as not being in their personal best interest). It is this problem that our rule should seek to address.

The ABA utilizes a two tier approach in rule 1.13(b) and (c) because under the second tier, reporting outside the organization is permitted. Since outside reporting is expressly prohibited under paragraph (D), it remain unclear to me, (and I believe it will be confusing to the average practitioner and the public), why we are employing the current two tier approach in our rule. We can accomplish what we set out to do at our meeting last October by tracking the language of Rule 1.13(b) with minor modifications.

July 27, 2004 KEM E-mail to Lamport, cc to Sondheim & Difuntorum:

Stan:

I reviewed my notes from the last meeting and went through the most recent draft of 3-600 (Draft 4, dated 5/10/04), and suggested some revisions before the rule is sent out for a 10-day mail ballot. They are mostly an attempt to conform language within the rule, conform the discussion to the rule, or to conform the Discussion to the Cal. style format. With the impending agenda mailing next week for the 8/27 & 8/28/04 meeting, there is no rush. That has priority.

I attach the following:

1. New draft 5, in WP and Word.

2. An annotated PDF file, comparing draft 5 to your draft 4. The endnotes explain the changes I made (there are only seven!)

3. My notes on 3-600 for the 7/9/04 meeting, in WP and PDF.

As usual, if you have any questions, please don't hesitate.

Kevin

December 23, 2004 KEM E-mail to Stan Lamport, cc to Sondheim, Difuntorum & McCurdy:

Stan:

At the 12/10/04 meeting, we briefly discussed rule 3-600 and you asked me to send you the materials, as you may have a window open to work on it over the holidays. I'm forwarding an e-mail & attachments I sent you previously concerning the rule.

The rule was voted out at the 7/9/04 meeting, but there remained some drafting issues that you proposed handling by mail ballot.

In addition, the Discussion (Comment) section was deemed approved as there had not been any objections. As I prepared the attached draft following the 7/9 meeting, however, I noticed that the some of the discussion language no longer conformed with the revised black-letter language and suggested some changes (see red-line). You were swamped at the time and noted in a 7/28 e-mail that you needed some time to consider my proposed changes.

Please let me know if there is anything else you may need and if there is anything I can do to help out on this.

Again, have a healthy and enjoyable holiday.

Kevin

February 18, 2005 KEM E-mail to Drafting Team, cc to Sondheim, Difuntorum & McCurdy:

Greetings Stan & all:

I misdirected this e-mail earlier. Kurt, you're getting two copies, but I wanted to get the entire drafting team on a single e-mail. My understanding now is that the drafting team is Stan (lead), Linda, Kurt, Tony and me. Below is the e-mail I sent earlier.

I've attached the following files to this e-mail:

1. New draft 5, in WP and Word.

2. An annotated PDF file, comparing my draft 5 to Stan's draft 4, which was voted out for a 10-day mail ballot at the 7/9/04 meeting. The endnotes explain the changes I made (there are only seven!)

3. My notes on 3-600 for the 7/9/04 meeting, in WP and PDF.

This in part is what I wrote Stan back in late July:

I reviewed my notes from the last meeting and went through the most recent draft of 3-600 (Draft 4, dated 5/10/04), and suggested some revisions before the rule is sent out for a 10-day mail ballot. They are mostly an attempt to conform language within the rule, conform the discussion to the rule, or to conform the Discussion to the Cal. style format.

In essence, the rule including the discussion was voted for a 10-day ballot without first conforming the discussion to the language changes in the rule that were made at the 7/9/04 meeting. That is what we usually try to do before a 10-day ballot and I attempted to do just that in draft 5. Stan wanted to take some time to review those changes but we never got back to each other. It is now on your plate!

One style change that has to be made is to rename the Discussion "Comment" as voted by the RRC at the 11/19/04 meeting.

As usual, if you have any questions, please don't hesitate to call or write. Thanks,

Kevin

March 27, 2005 KEM E-mail to Sondheim, cc Difuntorum & McCurdy:

Harry:

Here's the e-mail I sent Stan. I was wrong; it wasn't mid-December but 12/23/04. Please note that the red-line attached compares Draft 5 (7/27/04, which has the revisions the RRC voted on at the 7/9/04 meeting and my revisions that attempted to reconcile the pre-meeting Discussion language with the rule language as voted at the 7/9 meeting) to the last draft the RRC saw, Draft 4. The comparison draft also contains some endnotes that explain my revisions.

Perhaps the best way to advance this is to just put the attached materials back on the calendar. Is it too late for our next meeting? My guess is that what Stan needed more time to consider was not so much my revisions to the Discussion, but rather my revisions to paragraph (F). See Endnote 2. That was an issue Joella raised during the 7/9/04 meeting and Stan wanted to consider her objections, and perhaps revise the rule. I offered my revisions and that may be what has held this up (Stan's 7/28/04 e-mail to me stated: " I took a quick look at the changes and see that this will require some thought," so I think his comment was probably addressed primarily at paragraph (F) and not at the revisions to the Discussion.)

Please let me know if there is anything further I can do.

Please let me know if you have any trouble retrieving the attachments. If so, I'll forward them in a clean e-mail.

I've copied Randy and Lauren with this e-mail so they're both in the loop.

Thanks,

Kevin

May 18, 2005 Lamport E-mail to KEM:

Kevin: I am considering the following changes

Revise paragraph (F) to state: " A lawyer who reasonably believes that he or she had been discharged because of the lawyer's actions taken under paragraph (C) or who withdraws under circumstances that require the lawyer to take action under paragraph (C) shall inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so."

Revise comment [8] to state: "Paragraph (F) is intended to assure that the organization's highest authority is informed of a lawyer's discharge because of actions the lawyer has taken pursuant to paragraph (C) or the lawyer's withdrawal under circumstances that require a lawyer to take action under paragraph (C). Therefore, the lawyer must take steps to inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so."

Revise comment [7] to state: "Paragraph (E) is intended to provide guidance in circumstances when the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to results in substantial injury to the organization. It does not require a lawyer who proceeds under paragraph (B) to refer the matter to the highest authority before a lawyer may withdraw from representing the organization. Paragraph (E) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under rule 3-700.

Add a new comment [10], which would state: "Although paragraph (H) requires that the organization's consent to a dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent to be represented in the dual representation. When there is no other constituent who can consent for the organization, the constituent represented in the dual representation may provide such consent."

We should consider dropping comment [10] from the rule. This has been a problematic paragraph from the start. I don't think it provides any useful guidance to the legal profession.

May 19, 2005 Lamport E-mail to KEM:

Attached is a clean and redlined revised rule. I have some changes to Kevin's suggested revisions, which I would like to go over with him before this goes out for the 10-day mail ballot. I have corresponded with Kevin separately on the main issues. I await his response.

May 25, 2005 KEM E-mail to Lamport, cc Sondheim, Difuntorum & McCurdy:

Greetings all:

Please accept my apologies for not responding sooner. I was traveling and yesterday came down with a 24-hour virus that was afflicting folks on the tour.

I've reviewed Stan's latest draft and have a few comments.

1. I continue to believe that the California rule should not allow reporting out as does the ABA rule (no surprise there). I also continue to believe that the trigger for reporting WITHIN the corporation should be broad -- i.e., [1] violation of a legal obligation to the organization OR [2] a violation of law that reasonably might be imputed to the organization OR [3] a constituent acting or refusing to act in a manner that is likely to result in substantial injury to the organization. If California is going to take the position of no reporting out in the face of Sarbanes-Oxley, the ABA and all the other states that are in the process of adopting the Ethics 2000 recommendations, it should retain as it now does the three triggers in the disjunctive (as opposed to the ABA, which requires that either the first or the second trigger occur IN CONJUNCTION WITH the third before any duty attaches.)

2. The rule as currently drafted, however, is very complex, which is emphasized by Stan's revisions to paragraph (f) and comments [7] and [8].

a. These revisions have been necessitated by the approach we have taken in (b) and (c), i.e., requiring the lawyer to go up the ladder only if the third trigger (substantial injury to organization) is present. As I understand Stan's approach in limiting the application of (f) to lawyers who proceed under paragraph (c), it is that we only require lawyers who proceed under (c) to go up the ladder, and so (f), which also requires that the highest authority be made aware of the lawyer's discharge or withdrawal, such a requirement should only apply where the lawyer has withdrawn or been discharged pursuant to (c). We can all understand why the changes have been made, but I wonder how many "average" lawyers are going to understand the fine distinctions we've drafted into the law.

b. I originally thought that one way to simplify the rule would be to "merge" (b) and (c) along the same lines as in current rule 3-600, i.e., include all three triggers in a single paragraph and require that the lawyer go up the ladder if any of the triggers is present, "unless it reasonably appears to the lawyer that it is not necessary in the best lawful interest of the organization to do so." This latter language, which is also present in Model Rule, gives a lawyer discretion in going up the ladder, even where there is the potential for "substantial injury to the organization." A comment could then include the language that is now in (b)(1) and (2), and also emphasize the distinctions that we now have between paragraphs (b) and (c).

c. However, given that this rule can also be used for discipline, the current two-prong approach of paragraphs (b) and (c) is probably preferable in that it provides more of a "bright-line guidance" on how to proceed under the different triggers, and also would not require a lawyer to have to show why, under triggers [1] and [2], it was not in the best lawful interest of the organization to go up the ladder (I think that in a discipline

proceeding, the bar would probably be able to shift the burden easily under circumstances in which the matter might get to that stage – i.e., make a showing that the actions taken by the constituent came within the kinds of conduct contemplated by (b) and, had the lawyer only gone up the ladder, the injury incurred by the client organization could have been avoided, etc., etc. There could be a lot of Monday morning quarterbacking.)

3. So, given that having both a paragraph (b) and a paragraph (c) is probably preferable, we need to ask whether there is a way to avoid the complexity (and I think potential for confusion) that would result by changing the language in paragraph (f) and comments [7] and [8] as proposed by Stan in his most recent draft.

a. I would recommend that the we leave paragraph (f) as it was drafted in the draft I prepared on 7/27/04, i.e., include the reference to both paragraphs (b) and (c). It is entirely possible that a lawyer might be discharged by the constituent for raising an issue under the paragraph (b) triggers and, even if the lawyer would not have had to go up the ladder, the firing should be reported to the highest authority. I think that limiting paragraph (f) to actions taken under paragraph (c) would create more confusion than any downside that might arise from including a reference paragraph (b). True, there may be a lawyer who might not want to go through the trouble of reporting up the ladder on what he or she considers simply a difference of opinion between the lawyer and constituent. Also, a lawyer could use the potential for his or her going up the ladder as leverage to get the constituent to come around to the lawyer's point of view. However, that leverage is always there because the lawyer would not be prohibited from going up the ladder to report a firing or withdrawal even under Stan's draft. Therefore, I don't think Stan's revisions to (f) are necessary.

b. Finally, the member does not have to take any such steps if the member reasonably believes it is not in the best interests of the organization. Therefore, I would also leave comment [8] the same as in my 7/27/04 draft, i.e.:

> "[8] Paragraph (F) is intended to assure that organization's highest authority is informed of a member's discharge because of the actions the member has taken pursuant to paragraph (B) or (C). Therefore, the member must take steps to inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the member reasonably believes that it is not in the best lawful interest of the organization to do so."

4. I haven't made any changes to the draft other than some cosmetic changes (there were a few places where "member" still remained, etc. and I used lower case letters for the rule paragraphs). I've attached that draft, as well as a redline showing the changes made to Stan's 5/19/05 draft. I await your thoughts on my comments above.

Thanks,

Kevin

May 26, 2005 Lamport E-mail to KEM, cc to Sondheim, Difuntorum & McCurdy:

Kevin: Attached is a clean and redlined draft of rule 3-600 that incorporates all of the final changes we discussed. As we discussed, you will format the documents for distribution to the Commission.

Harry: As you will see, there are a lot of changes to the Comment in particular, much of which is a product of changes Kevin had suggested in his 4/7 draft. Kevin and I have discussed that there are enough changes that a 10-day mail ballot may not be the way to go here. I leave that the final decision up to you. Jerry and I have been corresponding by voice mail on 2-200. I am not sure I am comfortable with what Jerry has in mind, but we have not yet exhausted the possibilities. Jerry was traveling today. I have a rare open day tomorrow. I am hopeful that Jerry and I can speak directly tomorrow and come up with a joint recommendation to the Commission.

Stanley W. Lamport

May 28, 2005 Sondheim E-mail to KEM, cc Lamport, Difuntorum & McCurdy:

Kevin--

I note that in prior e-mails you and Stan had some differences of opinion regarding the text of this rule. Does the attached draft represent your joint consensus?
Cheers,
Harry

May 28, 2005 KEM E-mail to Sondheim, cc Lamport, Difuntorum & McCurdy:

Harry:

That's correct. We resolved our differences over the language in paragraph (f) and comment [8] by adding what is now the last sentence in comment [8]. Thanks,

Kevin

May 29, 2005 Sondheim E-mail to KEM, cc Lamport, Difuntorum & McCurdy:

Kevin--

I would like to avoid placing this matter on the agenda again if possible, but I want to be sure that a mail ballot is consistent with whatever instructions were given by the Commission when this matter was voted out last summer. Could you please send me the text of the "final" vote on the Commission's instructions.
Thanks,
Harry

May 29, 2005 KEM E-mail to Sondheim, cc Lamport, Difuntorum & McCurdy:

Harry:

I've attached my meeting notes on 3-600 for 7/9/2004 (two pages), as well as the Meeting Summary Randy prepared (one page), both in WordPerfect.

1. As to whether a mail ballot appears consistent with the vote at the 7/9/04 meeting, the focus of any changes to the rule as considered by the Commission at that meeting was to be paragraph (f), which (together with comment [8]) was also the focus of my disagreement with Stan. I had initially voiced my concerns with Stan's original paragraph (f) both at the 7/9/04 meeting and in my e-mails immediately following (7/27/04 e-mail, with post-7/9/04 draft attached). Joella had also raised concerns with respect to paragraph (f) at the 7/9/04 meeting.

2. As you probably recall from my e-mails on 3-600 earlier this year, I also made some changes in the 7/27/04 draft to the comments to conform them to the votes that had been taken at the 7/9/04 meeting. I also moved some of the comment language around to conform it to the California style. Many of the apparent revisions in the comments are due to moving text rather than adding it.

3. Nevertheless, I believe that in this latest draft, Stan also added, in addition to the revisions to comment [8], the following comments: comment [7], comment [10], and the revisions to comment [11].

4. Finally, please recall that at the 7/9/2004 meeting, you deemed the comments then before the Commission approved as no objections had been registered prior to the meeting.

I hope this helps.

Kevin

Attachment (7/9/2004 Meeting Summary):

E. Consideration of Rule 3-600. Organization as Client.

The Commission considered draft 4 (5/10/04) of proposed amended rule 3-600 presented by Mr. Lamport. The Chair called attention to an e-mail by Mr. Tuft in which he stated that he is opposed to the two-tiered approach and wanted it noted in the minutes. Mrs. Julien also expressed general concerns about the proposed amended rule. Among the points raised during this discussion were the following:

a. Under proposed rule 3-600(F), there is a concern about to whom the employee reports when they are discharged and what the member is supposed to report beyond the mere fact of the discharge.
b. Under proposed rule 3-600(F), the lawyer reporting that they are discharged is not enough; they must report that they believe that they were discharged because of efforts to correct misconduct.
c. Consideration should be given to clarifying paragraph (F) in the discussion section.

d. Even if the lawyer discloses to the highest authority, the immediate supervisors may not be informed of the reason for the discharge.
e. The point of reporting up to the highest authority is so the highest authority can perform its fiduciary duty regarding corporate governance.
f. The lawyer is protecting the organization so they must go up the ladder. There is no requirement or ability to go outside the organization.
g. Even if a two-tier approach is not ultimately adopted, the Commission's record will show that it considered options for enhancing accountability short of outside reporting provisions.

Following the discussion, the Commission considered a motion to make the trigger in (C) to require a violation of law or a fiduciary breach and substantial injury. The motion failed by a vote of 1 yes, 6 no, and 1 abstention. The Commission also agreed that Mr. Lamport would address paragraph (F) by mail ballot and take into consideration the concerns voiced by the Commission members. Mr. Lamport is assigned to clarify whether the member would be held to a mandatory duty to inform the "highest internal authority" of the circumstances or of the fact of the member's discharge, or both.

May 31, 2005 10-day Mail Ballot Cover Memo from Difuntorum to RRC:

DATE: May 31, 2005
TO: Members of the Commission for the Revision of the Rules of Professional Conduct
FROM: Randall Difuntorum, Commission Staff Counsel
SUBJECT: 10-day Mail Ballot Circulation of Proposed Rule 1.13 (Rule 3-600)

Proposed rule 1.13 (rule 3-600) is being distributed for your consideration. In accordance with the Commission's discussion at its July 9, 2004 meeting, the codrafters have implemented modifications to the proposed rule and tentative approval is being sought through a 10-day mail ballot procedure.

Specifically, paragraph (f) of the rule and comment [8] have been amended by the codrafters in follow-up to the discussion at the July 9, 2004 meeting. In addition, although not the focal point of the discussion at the July 9, 2004 meeting, comments [7] and [10] were added and comment [11] was revised. For purposes of this mail ballot, objections are limited to these changes (namely: paragraph (f); comments [7], [8], [9], [10], or [11]).

Tentative approval means that the proposed new rule would not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors' Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution.

The full text of proposed rule 1.13 (rule 3-600) is provided as Enclosure 1. A redline version showing changes to Draft 4 (the version considered at the July 9, 2004 meeting) is provided as Enclosure 2. A redline version showing changes to current rule 3-600 is provided as Enclosure 3.

Pursuant to the Commission's 10-day mail ballot procedure, if six or more members object to this proposed new rule, then the proposed new rule will be placed on the next agenda for further

consideration. Objections should be in writing, explaining reasons for the objection, and sent to me. If less than six objections are received by 5 p.m. on June 10, 2005, proposed rule 1.13 (rule 3- 600) will be deemed tentatively approved.

Questions about this mail ballot may be directed to me at (415) 538-2161.

Thank you.

June 1, 2005 Voogd E-mail to Lauren McCurdy (transmitted to RRC on 6/1/2005):

I vote no. Our variant is better than the ABA rule: however it is is not sufficiently better than the ABA rule as to warrant the confusion of having two conflicting rules simultaneously governing one attorney.

Tony

June 1, 2005 Peck E-mail to RRC:

I also vote no. My reasons could not have been better stated that Tony Voogd has articulated them.

June 6, 2005 Tuft E-mail to RRC:

I vote no on proposed rule 1.13 (3-600) circulated for a 10 day mail ballot.

The proposed two tier approach in subparagraphs (b) and (c) is contrary to the internal reporting requirements of any other jurisdiction as well as the Restatement and I believe sends the wrong message to the public concerning the duty of loyalty and communication owed to organizational clients in today's legal environment. There is no justification for California to set itself so far apart from the rest of the country on such an important matter.

The juxtaposition between paragraphs (b) and (c) on what lawyers may and must do on internal reporting of significant developments is confusing and, in my view, diminishes the lawyer's duties to the organizational client. As an example, rule 1.13 provides in cmt 5 that the authority and responsibility provided in the rule are concurrent with the authority and responsibility provided in other rules, while proposed comment 2 to this rule tells lawyers that (b) and (c) define the duty to inform the client in the context of representing organizations.

Rule 1.13(b) provides must clearer and

June 6, 2005 Ruvolo E-mail to RRC:

I vote no on proposed rule 1.13 (3-600) circulated for a 10 day mail ballot.

The proposed two tier approach in subparagraphs (b) and (c) is contrary to the internal reporting requirements of any other jurisdiction as well as the Restatement and I believe sends the wrong message to the public concerning the duty of loyalty and communication owed to organizational

clients in today's legal environment. There is no justification for California to set itself so far apart from the rest of the country on such an important matter.

The juxtaposition between paragraphs (b) and (c) on what lawyers may and must do on internal reporting of significant developments is confusing and, in my view, diminishes the lawyer's duties to the organizational client. As an example, rule 1.13 provides in cmt 5 that the authority and responsibility provided in the rule are concurrent with the authority and responsibility provided in other rules, while proposed comment 2 to this rule tells lawyers that (b) and (c) define the duty to inform the client in the context of representing organizations.

Rule 1.13(b) provides must clearer and

June 6, 2005 Peck E-mail to RRC:

I have already voted no, but want to record that I agree with Mark's articulation of why he is voting no.

June 6, 2005 Kehr E-mail to RRC:

I also vote "no" on this proposal.

June 6, 2005 Melchior E-mail to RRC:

I can't find the draft on which we are supposed to be voting, nor the direction that the rule passes if not voted down by 6/1 -- except that the material for this Friday so states (Item II A) but without accompanying materials.

The latest material I have on my computer is a set of drafts prepared by Kevin as of 2/18/05, which contains 3-600 (B) and (C) in ways which seem to make little sense. I will paste them below this message to see whether I have them pegged correctly.

If they are indeed what we are voting on, I also vote No. I think that I voted No when we originally discussed this draft. No point in stating my reasons. If that is not the right draft, I am lost, and not voting. Sorry.

Here's the paste job:

> "(B) If a member representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is or may be a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:
>
> > (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(C) If a member representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the member may take actions permitted in paragraph (B). Unless it reasonably appears to the member that it is not necessary in the best lawful interest of the organization to do so, the member shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law."

June 6, 2005 Lamport E-mail to RRC:

Dear Colleagues:

So I get that this is coming back. I realize it has been some time since the Commission approved (b) and (c) last July. The ten-day ballot was only to address the changes to the Comment and subpart (f).

In anticipation of further discussion on Friday, I offer this explanation why the Commission voted last July for the (b) and (c) approach and why we are not producing the negative result that has been suggested.

Our current rule states what a lawyer must do if a constituent acts, intends to act or refuses to act in a manner that is a violation of law reasonably imputable to the organization or in a manner that likely to result in substantial injury to the organization. It is entirely permissive.

The current version of ABA Model Rule 1.13 contains only a mandatory reporting requirement. That mandatory reporting requirement is fairly limited. It applies only if the lawyer knows a constituent acts, intends to act or refuses to act in a manner that is either a violation of a legal obligation to the organization OR is a violation of law reasonably imputable to the organization AND is likely to result in substantial injury to the organization. Under the ABA rule there is no obligation to do anything with respect to a violation of law or a breach of duty unless that conduct involves substantial injury to the organization. A lawyer can literally look the other way under the Model Rule and not have to do anything until, if ever, the conduct rises to the level that substantial injury to the organization is likely.

Last year, a majority of the Commission felt that the rule should still require the lawyer to follow the pre-existing protocol in those situations that did not involve substantial injury to the organization. We therefore created (b) to address that situation.

When we got to (c), we decided to modify 1.13 in three ways. First, we decided that the obligation to report up the chain should trigger whenever the act, intention to act, or refusal to act is likely to result in substantial injury to the organization and that the obligation should arise even if the conduct is not a criminal act or a breach of duty to the organization. So we put in an unqualified substantial injury standard. In other words, we expanded the reporting requirement.

Second, 1.13 does not apply unless the offending conduct is in the matter in which the lawyer represents the organization. In other words, if you have a limited scope of engagement and you see conduct that would likely result in substantial injury in connection with something that is beyond the scope of your limited engagement, you can stand mute. You are not even required to urge reconsideration or do anything in the best interests of the organization. To address this we took the "in the matter" language out, which also broadened the trigger for upward reporting.

Third, we decided that even if a lawyer must go up the chain, that lawyer should still take the actions permitted in paragraph (b) to stop the bad behavior or prevent it from occurring. Accordingly, we added a cross reference to (b). The only guidance you get in 1.13 is to proceed as reasonably necessary in the best interest of the organization, whatever that means.

Last July a majority of the Commission thought these were good reasons to deviate from the Model Rule. I suppose we can reopen that discussion.

But I do not agree that we have diminished a lawyer's duty to the organization in our version of this rule. Our rule is more comprehensive. It provides more guidance. The scope of matters that trigger mandatory reporting is greater.

THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING & DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2167

DATE: May 31, 2005

TO: Members of the Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Commission Staff Counsel

SUBJECT: 10-day Mail Ballot Circulation of Proposed Rule 1.13 (Rule 3-600)

Proposed rule 1.13 (rule 3-600) is being distributed for your consideration. In accordance with the Commission's discussion at its July 9, 2004 meeting, the codrafters have implemented modifications to the proposed rule and tentative approval is being sought through a 10-day mail ballot procedure.

Specifically, paragraph (f) of the rule and comment [8] have been amended by the codrafters in follow-up to the discussion at the July 9, 2004 meeting. In addition, although not the focal point of the discussion at the July 9, 2004 meeting, comments [7] and [10] were added and comment [11] was revised. For purposes of this mail ballot, objections are limited to these changes (namely: paragraph (f); comments [7], [8], [9], [10], or [11]).

Tentative approval means that the proposed new rule would not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors' Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution.

The full text of proposed rule 1.13 (rule 3-600) is provided as Enclosure 1. A redline version showing changes to Draft 4 (the version considered at the July 9, 2004 meeting) is provided as Enclosure 2. A redline version showing changes to current rule 3-600 is provided as Enclosure 3.

Pursuant to the Commission's 10-day mail ballot procedure, if six or more members object to this proposed new rule, then the proposed new rule will be placed on the next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me. **If less than six objections are received by 5 p.m. on June 10, 2005, proposed rule 1.13 (rule 3-600) will be deemed tentatively approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161.

Thank you.

Enc.

Proposed New Rule 1.13 (rule 3-600)

(Clean version of proposed rule as amended following the Commission's 7/9/04 meeting.)

Rule 3-600. Organization as Client

(a) In representing an organization, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is or may be a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(c) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the lawyer may take actions permitted in paragraph (b). Unless it reasonably appears to the lawyer that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(d) In taking any action pursuant to paragraphs (b) or (c), the lawyer shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).

(e) If, despite the lawyer 's actions in accordance with paragraph (b) or (c), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to result in substantial injury to the organization, the lawyer 's response is limited to the lawyer 's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(f) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (c) or who withdraws under circumstances that require or permit the lawyer to take action under paragraph (c) shall inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.
(g) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer's client, when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing. In such circumstances, the lawyer shall not mislead such a constituent into believing that the constituent may communicate confidential information to the lawyer in a way that will not be used in the organization's interest.

(h) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to a dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Comment:

[1] Rule 3-600 is intended to apply to all forms of legal entities including corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions.

[2] When constituents of an organization make decisions for it, ordinarily a lawyer must accept those decisions even if their utility or prudence is doubtful. At the same time, a lawyer has a duty to inform a client of significant developments related to the representation under Rule 3-500 and Business and Professions Code section 6068, subdivision (m). Paragraphs (b) and (c) address the application of the duty to inform a client in the context of the representation of an organization.

[3] The difference between paragraph (b) and paragraph (c) turns on whether the actions of the officer, employee or other person associated with the organization is likely to result in substantial injury to the organization. When such action is likely to result in substantial injury to the organization, the lawyer must inform higher authority in the organization unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so.

[4] References to the best interest of the organization in Rule 3-600 are not intended to require a lawyer to exercise judgment for the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the constituent(s) overseeing the

engagement. In determining the best interests of the organization, lawyers should consider the extent to which the organization should be informed of the circumstances and the direction the lawyer has received from the organization client.

[5] In determining how to proceed under paragraphs (b) and (c) lawyers should give due consideration to the seriousness of the violation and, where applicable, the consequences of the violation or act, the responsibility of the organization, the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

[6] In circumstances governed by paragraph (c), ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require the matter be referred to higher authority. If the constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to refer the matter to a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.

[7] Paragraph (e) is intended to provide guidance in circumstances when the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to results in substantial injury to the organization. It does not require a lawyer who proceeds under paragraph (b) to refer the matter to the highest authority before a lawyer may withdraw from representing the organization. Paragraph (e) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under rule 3-700.

[8] Paragraph (f) is intended to assure that the organization's highest authority is informed that a lawyer has been discharged because of the actions the lawyer has taken pursuant to paragraph (c) or the lawyer has withdraw under circumstances that require a lawyer to take action under paragraph (c). In such circumstances, the lawyer must take steps to inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawyer interest of the organization to do so. Paragraph (f) does not apply when a lawyer is discharged because of the actions the lawyer has taken pursuant to paragraph (b) or a lawyer who withdraws under circumstances that warrant the lawyer taking action under paragraph (b). While a lawyer who is discharged or withdraws in such circumstances is not required to inform the organization's highest authority of the lawyer's discharge or withdrawal, the lawyer may do so in the manner specified in paragraph (b).

[9] Paragraph (G) is intended to require lawyers to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the lawyer is representing the constituent individually, when the lawyer does not intend to create such a relationship. At the same time, paragraph (h) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(c)(1) and (c)(2).

[10] Paragraph (h) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent.

[11] Rule 3-600 is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105; Forrest v. Baeza (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)

ENCLOSURE 2

Proposed New Rule 1.13 (rule 3-600)

(Redline version showing changes to Draft No. 4, the version considered at the Commission's 7/9/04 meeting.)

Rule 3-600. Organization as Client

~~(A)~~**(a)** In representing an organization, a ~~member~~ **lawyer** shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

~~(B)~~**(b)** If a ~~member~~ **lawyer** representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is or may be a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, the ~~member~~ **lawyer** may take such actions as appear to the ~~member~~ **lawyer** to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

~~(C)~~**(c)** If a ~~member~~ **lawyer** representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the ~~member~~ **lawyer** may take actions permitted in paragraph ~~(B)~~**(b)**. Unless it reasonably appears to the ~~member~~ **lawyer** that it is not necessary in the best lawful interest of the organization to do so, the ~~member~~ **lawyer** shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law. ~~The member may take such other actions as appear to the member to be in the best lawful interest of the organization including among others urging reconsideration of the matter while explaining its likely consequences to the organization.~~

~~(D)~~**(d)** In taking any action pursuant to paragraphs ~~(B)~~**(b)** or ~~(C)~~,**(c),** the ~~member~~ **lawyer** shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).

~~(E)~~**(e)** If, despite the ~~member's~~ **lawyer 's** actions in accordance with paragraph ~~(B)~~**(b)** or ~~(C)~~**(c)**, the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to result in substantial injury to the organization, the ~~member's~~ **lawyer 's** response is limited to the ~~member's~~ **lawyer 's** right, and, where appropriate, duty to resign in accordance with rule 3-700.

~~(F)~~**(f)** A ~~member~~ **lawyer** who reasonably believes that he or she has been discharged because of the ~~member's~~ **lawyer's** actions taken pursuant to paragraph ~~(B) or (C) and who has not informed the highest internal authority that can act on behalf of the organization of the circumstances shall so inform such authority unless the member~~**(c) or who withdraws under circumstances that require or permit the lawyer to take action under paragraph (c) shall inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer** reasonably believes that it is not ~~necessary~~ in the best **lawful** interest of the organization to do so.

~~(G)~~**(g)** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a ~~member acting on behalf of~~ **lawyer representing** an organization shall explain the identity of the ~~member's~~ **lawyer's** client, when the ~~member~~ **lawyer** knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the ~~member~~ **lawyer** is dealing. In such circumstances, the ~~member~~ **lawyer** shall not mislead such a constituent into believing that the constituent may communicate confidential information to the ~~member~~ **lawyer** in a way that will not be used in the organization's interest.

~~(H)~~**(h)** A ~~member~~ **lawyer** representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to a dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

~~Discussion:~~

Comment:

[1] Rule 3-600 is intended to apply to all forms of legal entities including corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. Rule 3-600 is ~~intended to require members to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the member is representing the constituent individually, when the member does not intend to create such a relationship. At the same time, Rule 3-600 is not intended to prohibit members from representing both an organization and a constituent of an organization in the same matter, so long as the member has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(C)(1) and (C)(2). Rule 3-600 is also not intended to prohibit members from representing both an organization and a constituent of an organization in separate matters, so long as the member has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.)~~**not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions.**

[2] When constituents of an organization make decisions for it, ordinarily a ~~member~~ **lawyer** must accept those decisions even if their utility or prudence is doubtful. At the same time, a ~~member~~

lawyer has a duty to inform a client of significant developments related to the representation under Rule 3-500 and Business and Professions Code section 6068, subdivision (m). Paragraphs ~~(B)~~**(b)** and ~~(C)~~**(c)** address the application of the duty to inform a client in the context of the representation of an organization.

[3] The difference between paragraph ~~(B)~~**(b)** and paragraph ~~(C)~~**(c)** turns on whether the ~~violation of the legal duty to the organization or the violation of law~~ **actions of the officer, employee or other person associated with the organization** is likely to result in substantial injury to the organization. When ~~the violation~~ **such action** is likely to result in substantial injury to the organization, the ~~member~~ **lawyer** must inform higher authority in the organization unless the ~~member~~ **lawyer** reasonably believes that it is not necessary in the best interest of the organization to do so.

[4] References to the best interest of the organization in Rule 3-600 are not intended to require a ~~member~~ **lawyer** to exercise judgment for the organization or to take action on behalf of the organization independently of the direction the ~~member~~ **lawyer** receives from the constituent(s) overseeing the engagement. In determining the best interests of the organization, ~~members~~ **lawyers** should consider the extent to which the organization should be informed of the circumstances and the direction the ~~member~~ **lawyer** has received from the organization client.

[5] In determining how to proceed under paragraphs ~~(B)~~**(b)** and ~~(C) members~~**(c) lawyers** should give due consideration to the seriousness of the violation and ~~its~~**, where applicable, the** consequences **of the violation or act**, the responsibility of the organization ~~and~~**,** the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

[6] In circumstances governed by paragraph ~~(C)~~**(c)**, ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the ~~member~~ **lawyer** to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the ~~member's~~ **lawyer's** advice, the ~~member~~ **lawyer** may reasonably conclude that the best interest of the organization does not require the matter be referred to higher authority. If the constituent persists in conduct contrary to the ~~member's~~ **lawyer's** advice, it will be necessary for the ~~member~~ **lawyer** to refer the matter to a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the ~~member~~ **lawyer** has not communicated with the constituent.

~~Paragraph (E) is intended to address a member's duty to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client under Rule 3-700(A)(2) when the member or the organization terminates the member's representation.~~

[7] Paragraph (e) is intended to provide guidance in circumstances when the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to results in substantial injury to the organization. It does not

require a lawyer who proceeds under paragraph (b) to refer the matter to the highest authority before a lawyer may withdraw from representing the organization. Paragraph (e) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under rule 3-700.

[8] Paragraph (f) is intended to assure that the organization's highest authority is informed that a lawyer has been discharged because of the actions the lawyer has taken pursuant to paragraph (c) or the lawyer has withdraw under circumstances that require a lawyer to take action under paragraph (c). In such circumstances, the lawyer must take steps to inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawyer interest of the organization to do so. Paragraph (f) does not apply when a lawyer is discharged because of the actions the lawyer has taken pursuant to paragraph (b) or a lawyer who withdraws under circumstances that warrant the lawyer taking action under paragraph (b). While a lawyer who is discharged or withdraws in such circumstances is not required to inform the organization's highest authority of the lawyer's discharge or withdrawal, the lawyer may do so in the manner specified in paragraph (b).

[9] Paragraph (G) is intended to require lawyers to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the lawyer is representing the constituent individually, when the lawyer does not intend to create such a relationship. At the same time, paragraph (h) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(c)(1) and (c)(2).

[10] Paragraph (h) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent.

[11] Rule 3-600 is not intended to ~~create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions.~~ **prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.)** In dealing with a close corporation or small association, ~~members~~ **lawyers** commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, ~~members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty~~ **a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law**. (See ~~People ex rel Deukmejian v. Brown (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478];~~ Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re

Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th ~~1105.) In resolving such multiple relationships, members must rely on case law.~~ **1105; Forrest v. Baeza (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)**

ENCLOSURE 3

Proposed New Rule 1.13 (rule 3-600)
(Redline version showing changes to current rule 3-600.)

Rule 3-600. Organization as Client

(A) In representing an organization, a member lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of lawyer representing an organization knows that an actual officer, employee or apparent agent of other person associated with the organization acts is engaged in action or intends to act or refuses to act in a manner that is or may be a violation of law reasonably imputable a legal obligation to the organization, or in a manner which is likely to result in substantial injury a violation of law that reasonably might be imputed to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member lawyer may take such actions as appear to the member lawyer to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(c) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the lawyer may take actions permitted in paragraph (b). Unless it reasonably appears to the lawyer that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(d) In taking any action pursuant to paragraphs (b) or (c), the lawyer shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).

(C) If, despite the member's lawyer 's actions in accordance with paragraph (B) or (c), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law and reasonably imputable to

the organization or is likely to result in substantial injury to the organization, the ~~member's~~lawyer 's response is limited to the ~~member's~~lawyer 's right, and, where appropriate, duty to resign in accordance with rule ~~3-700.~~

~~(D~~3-700.

(f) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (c) or who withdraws under circumstances that require or permit the lawyer to take action under paragraph (c) shall inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.

(g) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a ~~member~~lawyer representing an organization shall explain the identity of the lawyer's client ~~for whom the member acts~~, ~~whenever it is~~when the lawyer knows or ~~becomes apparent~~reasonably should know that the organization's interests are ~~or may become~~ adverse to those of the constituent(s) with whom the ~~member~~lawyer is dealing. ~~T~~ In such circumstances, the ~~member~~lawyer shall not mislead such a constituent into believing that the constituent may communicate confidential information to the ~~member~~lawyer in a way that will not be used in the organization's interest ~~if that is or becomes adverse to the constituent~~.

(~~E~~h) A ~~member~~lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-~~-~~310. If the organization's consent to ~~the~~a dual representation is required by rule 3-~~-~~310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

~~***Discussion:***~~

~~Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.~~

~~Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

~~Rule 3-600~~

Comment:

[1] Rule 3-600 is intended to apply to all forms of legal entities including corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. Rule 3-600 is

not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. ~~In dealing with a close corporation or small association, members commonly perform professional engagements for both~~

[2] When constituents of an organization make decisions for it, ordinarily a lawyer must accept those decisions even if their utility or prudence is doubtful. At the same time, a lawyer has a duty to inform a client of significant developments related to the representation under Rule 3-500 and Business and Professions Code section 6068, subdivision (m). Paragraphs (b) and (c) address the application of the duty to inform a client in the context of the representation of an organization.

[3] The difference between paragraph (b) and paragraph (c) turns on whether the actions of the officer, employee or other person associated with the organization is likely to result in substantial injury to the organization. When such action is likely to result in substantial injury to the organization, the lawyer must inform higher authority in the organization unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so.

[4] References to the best interest of the organization in Rule 3-600 are not intended to require a lawyer to exercise judgment for the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the constituent(s) overseeing the engagement. In determining the best interests of the organization, lawyers should consider the extent to which the organization should be informed of the circumstances and the direction the lawyer has received from the organization client.

[5] In determining how to proceed under paragraphs (b) and (c) lawyers should give due consideration to the seriousness of the violation and, where applicable, the consequences of the violation or act, the responsibility of the organization, the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

[6] In circumstances governed by paragraph (c), ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require the matter be referred to higher authority. If the constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to refer the matter to a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.

[7] Paragraph (e) is intended to provide guidance in circumstances when the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to results in substantial injury to the organization. It does not require a lawyer who proceeds under paragraph (b) to refer the matter to the highest authority before a lawyer may withdraw from representing the organization. Paragraph (e) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under rule 3-700.

[8] Paragraph (f) is intended to assure that the organization's highest authority is informed that a lawyer has been discharged because of the actions the lawyer has taken pursuant to paragraph (c) or the lawyer has withdraw under circumstances that require a lawyer to take action under paragraph (c). In such circumstances, the lawyer must take steps to inform the organization's highest authority of the lawyer's discharge or withdrawal, unless the lawyer reasonably believes that it is not in the best lawyer interest of the organization to do so. Paragraph (f) does not apply when a lawyer is discharged because of the actions the lawyer has taken pursuant to paragraph (b) or a lawyer who withdraws under circumstances that warrant the lawyer taking action under paragraph (b). While a lawyer who is discharged or withdraws in such circumstances is not required to inform the organization's highest authority of the lawyer's discharge or withdrawal, the lawyer may do so in the manner specified in paragraph (b).

[9] Paragraph (G) is intended to require lawyers to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the lawyer is representing the constituent individually, when the lawyer does not intend to create such a relationship. At the same time, paragraph (h) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(c)(1) and (c)(2).

[10] Paragraph (h) requires that the organization's consent to dual representation of representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. However, when there is no other constituent who can consent for the organization, the constituent to be represented in the dual representation may provide such consent.

[11] Rule 3-600 is not intended to prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.) In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, ~~members are faced with complex decisions involving personal and institutional relationships and loyalties and~~

~~have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478];~~ a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105; Forrest v. Baeza (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].) ~~In resolving such multiple relationships, members must rely on case law.~~